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THE MECHANIC'S LIEN LAW—A SUGGESTED SUBSTITUTE.

Some years ago I ventured to write articles for the "Register", going into some detail of the travail of the Virginia "Mechanic's Lien" law. It is one thing that the Legislature might feel constrained to put into experienced hands. It ought to be simple. Instead it is highly technical. It ought to be permanent. Instead it is altered at every session. It is practical only when reason is read into it by the courts. Instead of being easily perfected, a lawyer is necessary at every stage. It ought to be simply, inexpensively and quickly enforced. Instead it requires a complicated chancery suit. Moreover, it fails in its mission for it preserves only what the bad contractor has been unable to collect from the owner and dissipate. Manifestly it is wholly unsuited to the conditions and to the personnel it was intended to assist and protect. And yet the solution of the problem is simple, if the Legislature really means to protect.

THE SUGGESTED REMEDY.

It is suggested that the General contractor's bond run to the benefit of the materialmen and laborers, as well as to the owner, as in Government construction bonds. This would have to be achieved indirectly but it can be accomplished by merely fixing absolute liability on the owner, when such a bond is not taken and an absolute guarantee of immunity when it is. That is simple enough. I proposed this plan and prepared the necessary statutes six years ago. It was approved by the contractors and materialmen and bankers but was rejected by the Legislature for what, it is believed, was a lack of familiarity with the subject and because it was new.

OBJECTIONS THAT WERE RAISED.

(1) Some suspicious persons thought it was conceived by the bonding companies. They had never heard of it. (2) Some

others feared it would suppress competition by eliminating contractors too financially weak to give the bond. Such a policy would install the incompetent in the seat of responsibility. (3) Some others were apprehensive lest "an inexperienced or thoughtless widow" might enter into a contract without requiring the bond and find herself personally liable. Such would visit an economic loss upon ninety-five per cent. of the people for the *possible* benefit of the balance. (4) Still others contended that materialmen and laborers were no more entitled to protection than any other citizens. Such are in conflict with the highest authorities in this State and of the world.* We may profitably go more into detail.

FURTHER ANALYSIS OF OBJECTIONS—THE FIRST.

As to the first objection, the idea is the result of twenty-five years of substantial and practical experience in perfecting and enforcing mechanic's liens. The substitution of the bond for the lien is solely my own suggestion. The basic principle is prevention instead of cure. It is an humble effort to improve government, although it will be done at the financial sacrifice of every specialist in mechanic's lien law. There will likely be as many personal as corporate bonds. It is idle to suggest that any competent and honest man could not find a bondsman. While no point was made of it, it is well to say that the expense of the bond would be less than one per cent. . The bad debt loss is reliably estimated at substantially twenty per cent. Obviously this loss is eventually paid by the home owner for whom a big saving is evident, not to mention the cost of litigation and counsel fees in an increasing number of contracts.

THE SECOND OBJECTION ANALYZED.

As to the second, no man whose credit is so poor or reputation is so bad that he cannot guarantee his labor and material bills, has the right to jeopardize the substance of these deserving people, either through bad judgment or dishonesty. The honest owner does not want to profit by either one. With knowledge of

*(Institutes of Justinian, Book 2, Title 1, § 41; Justinian Code by Sanders 182; Kent's Com. 522; The Sixth of the 12 Tables of Rome. The doctrine antedates the Twelve Tables and finds its origin in "natural justice".)

an evil and a remedy at hand it is the height of wisdom to prevent it; it is a governmental duty to act; it is wickedness not to do so. It was such improper contractors as these that brought the mechanic's lien statutes into existence. With their elimination the excuse for the mechanic's lien law will cease to exist. Therefore, honest competition will not be decreased. Moreover, the saving to materialmen in loss prevention will be reflected in the bids, wherein the owner will actually profit.

But above and beyond this practical benefit will be the higher morale amongst contractors that will follow. Ethics will become a very material matter. Men who now apparently knowingly engage insolvent contractors at greatly reduced bids, will no longer be able to profit by this method. The tendency to higher standards is apparent in every profession and avocation and ought to be encouraged by the Government in the building of homes and improvement of the land.

THE THIRD OBJECTION ANALYZED.

As to the third objection, it is now apparent that the incompetent contractor will be eliminated and put back into his place as a workman so that the chances of loss by "the widow" are reduced, if not eliminated. But, that the balance of the people should suffer and the possibility for an immoral condition to continue, rests neither in reason nor economics. Nothing is fool-proof.

THE FOURTH OBJECTION.

As to the fourth objection, the opponents find themselves in conflict with the policy of the Legislature and the reasoning of the Supreme Court of Appeals, the latter having declared the purpose of the law to be to encourage and to protect "a deserving class of people" in the fruits of their labor. It has been declared constitutional for that reason. But it has always been deemed wise to encourage home owning. To that extent the avocation of building is affected with a public interest. The very origin of mechanic's liens, as will presently appear, was the desire of the National Government to encourage building in the District of Columbia, when that beautiful city was a series of old fields or muddy flats. But the landlord is protected for his rent; the artisan for his labor; the lawyer for his skill and ad-

vice and there are many other examples—why not the mechanic and materialmen?

AN INFLUENCING DISTINCTION.

However, the materialman and the mechanic are in no sense on the same credit plane as the merchant, whose merchandise is consumed as delivered. Building material and labor go into structures permanently annexed to the freehold in accordance with plans and specifications and materially advance its value and make useful the land. None is used except that which is contemplated and contracted for by the owner. His selection of the avenue of payment, in the person of the general contractor, therefore makes possible the payment of this material and labor or its confiscation. And it matters not whether the wrong is committed fraudulently, ignorantly or carelessly, there is a certain moral obligation on the owner. One cannot be unmindful that in the beginning, the theory of the lien was absolute liability. A few hard cases influenced Legislative amelioration and limited his obligation to his liability to the contractor at the time of perfecting the lien. It was then too late, for there had been dissipated not only the contractor's profit but much of the substance of the materialmen and laborers.

BUSINESS STABILITY ASSURED.

With the existence of the proposed bond, the owner may continue in his indifference and the materialmen and laborers need not bother about the state of accounts between him and the general contractor. To no one does this more satisfactorily appeal than to the banker, who with peace of mind can safely finance the construction of buildings to completion. There will be no technical lien to perfect nor lengthy and costly chancery suits to conduct. A simple motion on the bond will suffice, if litigation should become necessary.

HISTORY IN SUPPORT.

In 1791 Thomas Jefferson and James Madison, two of the ablest Fathers of the Republic and then Commissioners for the District of Columbia, petitioned the Legislature of Maryland as follows: "Your memorialists conceive it would encourage master builders to contract for the erection and furnishing of houses

for certain prices agreed upon, if a lien was created by law for their just claim on the house erected and the lot of land on which it stood" (Proceedings of Commrs. from 1791 to '95, p. 28). An affirmative response created the first Mechanic's lien (Acts 1791 Ch. 45, Dec. 19). It was arbitrary and without limit save to the extent of all just unpaid labor and material incorporated in the building. Pennsylvania followed in 1803 and Virginia in 1843 (Acts 1842-3, p. 52). Every State has adopted it, toyed with it, enlarged it, modified it, created new programs and then done it over again. At one period Virginia's Code contained at one time every known method. And none of them were efficient. The longest period of non-molestation was from the adoption of the Code of 1849 until the new Code of 1860. The admirable lien provided by Judge Reily and his able fellow Codifiers (Code 1887) was hardly bound before the Legislature amended it (15 Va. L. Reg.). A serviceable National text book on the subject is impossible. A State text book would last only until the next Legislature, and probably, until the next decision by the Supreme Court on the subject. One may state "principles" but not the law for it is wholly statutory. One author, who laboriously prepared a book, found it out of date on completion and never printed his manuscript.

SOME RUSTIC PHILOSOPHY.

The Mechanic's Lien law permeates the being of the average Legislator like a robust case of rheumatism. He feels remiss in his duty to himself when not taking something for it, because everybody is complaining about it. An Auntie gives him a potato and Uncle Joe donates buckeye. He is torn between conflicting loyalties and loves and wears both, but at different times. In the mean while his unchecked disease is rioting amongst a rebellious anatomy and will continue until inefficiency alarms him into introspection and reason. He will then find the cause of his trouble, cure it and look to preventive measures in the future.

THE PRACTICAL RESULT PICTURED.

The boasted protection thrown around the materialman and laborers is a moat of nitro-glycerine that as often blows them into nothingness as it shields them from harm. The manner of perfecting the lien is highly technical and is strictly construed by the

courts. The manner of enforcing them is through a long, expensive and dilatory chancery suit. The evidence is taken before a Commissioner instead of in open court. This is the most condemned process of litigation known to jurisprudence. It is virtually prohibited in the Federal courts. Blackstone condemned it. The immaterial and irrelevant, inspired by ignorance or intent, ride complacently into the pocket of the poor litigant on padded depositions. It is no place for a litigant of small means. Indeed, the door of Justice is closed to the laborer and small claimant. But the delay is the deadly element, if the others were absent. This litigation ties up indefinitely the funds needed to clothe the backs and fill the mouths of children. This status is not conducive to inspiring belief in the wisdom of the government or faith in the administration of justice. Verily the seeds of rebellion are being sown in fertile soil. And, so, the State and society are also interested.

THE PROPOSED BOND PLAN.

It is proposed that every owner, upon letting a contract for the construction, repair or improvement of any building or structure permanently annexed to the freehold, shall take from such contractor an indemnifying bond, with approved security, conditioned upon (1) the faithful performance of his contract, which is for the owner's protection; and (2) the satisfaction of all just claims for material and labor actually incorporated into the structure, as hereinafter provided, whereupon his liability shall be to the contractor only, otherwise, he shall be liable for all unpaid material and labor going into the structure.

THE SIZE OF THE BOND.

Fixing the amount of the bond calls for a technical knowledge of the building trade. Building contracts either call for payment on architect's certificates as the work progresses, or in one payment, upon the completion and acceptance of the job. The latter is largely speculative. Inasmuch as opportunity for collection is presented to the materialman, sub-contractor and laborer in the first class, a bond of sixty per cent of the amount of the contract and probable extras would suffice but, in the second-class of contract it should be the same amount as the contract and the extras.

THE LIMIT OF PROTECTION.

As to the personnel to be protected, the same general principles of law would apply as are now in vogue in this and other jurisdictions. The object is to secure payment for all material and labor that actually enter into the structure, by whomsoever furnished. So, the question of the person who is to receive the protection becomes immaterial. By way of illustration, the painting would be let by the general contractor to a sub-contractor who, in turn, would buy the lead and oil and brushes from three different persons and would engage still other persons to apply it. The sub-contractor can assert a claim for the combined sum and satisfy his creditors out of the avails or he may permit each of them to proceed individually. The result is the same. The courts have universally limited the right to the lien to sub-contractors in the first degree in the absence of express, statutory provision including others. The Virginia statutes were amended in 1896 to meet this objection (Acts 15-6, p. 71) arising under the system then in vogue.

The principle underlying this plan applies with like force to the general contractor. He alone engages the sub-contractors and it devolves upon him to see to it, in his own interest, that reliable persons are engaged. He is at liberty to protect himself according to the dictates of his judgment. A criminal section, presently to be discussed, will prove an aid to him.

THE FORM OF THE BOND AND PROCEDURE THEREON.

The bond shall be in the name of the owner of the land; shall be executed by the general contractor and surety, and conditioned that if said general contractor shall, well and truly, pay or cause to be paid all just and proper claims for labor and material actually incorporated in such building or structure, in accordance with the contract and specifications attached to said bond, then said bond shall become null and void; otherwise, it shall be of full force and virtue. The statute should provide that any person interested as above contemplated, may bring suit on said bond in the name of the payee thereof (the owner) for the benefit of such person. But, before using his name, he shall indemnify said owner against the costs occasioned by such action which shall be double the probable amount or the costs of the action.

The action will be on a simple notice of motion attached to which shall be a copy of the bond and contract and a verified itemized bill of particulars of the claim. It will be provided that all other persons, similarly situated, may intervene in said action and obtain the full benefit of an independent action, separately instituted, by filing therein with leave of court in term time, or the clerk thereof in vacation, a like verified itemized bill of particulars. One copy of the bond and contract in the proceedings shall be sufficient. The court of its own motion, or by agreement, may hear all claims together, if complete justice demand such course. All such actions shall be disposed of promptly and, to that end, shall have preference over all other civil and criminal matters on the dockets of the courts.

FEATURES OF THE FEDERAL BOND.

The bond required by the Federal Government which is the prototype of the proposed Virginia bond, runs to the United States Government and all suits are brought in its name. For that reason it was suggested that the bond should be payable to the Commonwealth of Virginia and suits brought in its name. It must be borne in mind, however, that the Federal government is the owner. So, apart from any legal issue, the question should be solved in the interest of convenience and privity by confining all matters to the parties directly interested. Such a policy would keep the parties in close relation and would tend to an exchange of sentiment connotative of peace.

MISSTATEMENTS A MISDEMEANOR.

It follows that the general contractor should be legally armed to enforce honest reports from his sub-contractors that he may have accurate knowledge of the state of their accounts with materialmen and laborers. To that end, statutory requirement will be made upon every sub-contractor of whatever degree, upon request, to furnish a complete list of all such debtors with their correct addresses and a verified statement of what is then owing by him to them, together with the probable future indebtedness. Any such sub-contractor who shall fail or refuse to furnish such list and statement or shall furnish a false list or statement, shall be guilty of a misdemeanor to be put shable by a fine of not less than one hundred dollars or by confinement in jail not to exceed

one year, or both. Such punishment shall not relieve the guilty person from any other criminal liability and punishment already existing in law.

STATE SHOULD REQUIRE BOND.

Obviously the State of Virginia and all agencies of government, cities, counties and towns, should require such a bond of general contractors, inasmuch as a mechanic's lien will not lie against property owned by such governmental agencies. This is of the gravest importance.

THE PROPOSED STATUTE.

In order to put into effect the Indemnity Bond System, it is necessary to omit from Sec. 6428 of the Code the following:

"But the amount for which a sub-contractor may perfect a lien under this section shall not exceed the amount in which the owner is indebted to the general contractor at the time the notice is given, or shall thereafter become indebted to said general contractor upon his contract with said general contractor for said structure or building or railroad."

It is necessary to add the following new section: Sec. 6437a
"(1) Provided, however, that in lieu of the preceding sections and of any other requirements of law, the owner or lessee of the land, as the case may be, upon which it is proposed to construct, repair or improve any building or structure permanently annexed to the freehold, or to construct any railroad or any part thereof, at the time of entering into any contract thereof, may require of and take from the general contractor and each of the general contractors, in the event there be more than one so contracting to erect or improve such building or structure, a bond as hereinafter more particularly defined, with good and sufficient security, to be approved by the clerk of the court hereinafter named, under the same regulations now or hereafter provided as to other bonds required by law to be taken by said clerk, and for which service he shall receive a like compensation. Such bond shall be conditioned to pay and satisfy, or cause to be paid and satisfied, all just claims of sub-contractors for materials and labor, actually incorporated in such proposed building or structure under the provisions of the aforesaid contract, a copy of which said contract shall be attached to said bond and become a part

thereof. Upon the giving of such bond and the filing for registration of the same in a book to be known as the "Mechanic's Lien Bond Book", to be provided by the clerk and kept for the special purpose in the office of the clerk of the court in which deeds concerning the land in question are required to be registered, all liability of said owner or lessee for such labor and materials to others than to such general contractor or general contractors, as the case may be, shall cease and determine, all statutes to the contrary notwithstanding.

(2) "When the consideration in any such contract is payable as a whole sum, upon the entire execution of the same, or otherwise than as hereinafter mentioned, the penal sum of such bond shall be not less than the amount agreed by the owner to be paid to the general contractor for the entire contract; when the consideration is payable as the work progresses, upon the certificate of a duly licensed architect, then the penal sum of such bond shall be for a sum not less than sixty (60%) per cent of the consideration of such contract.

(3) "Such bond shall be substantially in general form approved by the Judge or the Clerk of the Court aforesaid, shall be executed by such general contractor and the surety or sureties, payable to the person, partnership or corporation claiming to be the owner of the land proposed to be improved and so conditioned in simple language as to carry out the intent hereof which said bond, both as to the letter and spirit thereof shall be liberally construed as a remedial measure. Suit may be brought upon any such bond by a sub-contractor in any degree in the name of the payee for the benefit of any such sub-contractor.

(4) "All such actions brought upon any such bond shall be instituted within ninety days after the completion or the abandonment of the work on the building or structure concerning the erection or repair of which it was given, and shall be in substantial form required by notice of motion for judgment, with a copy of said bond attached and the practice and procedure shall be substantially the same except that the defendant shall within eight days after service of such notice, file in the Clerk's office in which such action is instituted, a written, verified, circumstantial statement of his defense in numbered paragraphs, upon which only, the issues to be tried shall be joined. Such action

shall be tried without delay and no demurrer or plea shall prevent the same, and it shall have the right of way on both civil and criminal dockets. Provided, however, that before or at the time of the institution of such action the payee in said bond shall be indemnified in an amount not to exceed Ten Dollars against any expense arising out of the costs of such action.

(5) "It shall be the duty of every general contractor to demand, and of every sub-contractor to furnish such general contractor at each distribution period, an itemized verified statement of his indebtedness to each of his creditors, who have so furnished labor, materials or other things, giving his name and street address. Such general contractor shall, upon the written demand of such creditor, pay any such creditor directly, provided such demand be made before or at the time of such distribution and, provided, further, that the sum owing sub-contractor is sufficient to satisfy all his creditors, otherwise such sum shall be pro-rated amongst all his creditors as aforesaid. The receipts of such creditors shall be a complete defense to any and all claims by any such sub-contractor, his personal representatives and assigns, the same as if paid directly to such sub-contractor.

(6) "Any sub-contractor, who for the purposes of this act is any person dealing directly with the general contractor, who shall fail to furnish such statement, or who shall furnish a false statement at any time, shall be guilty of of a misdemeanor and shall be punished by a fine of not less than ten dollars nor more than one hundred dollars, or by confinement in jail not to exceed a period of one year, or both."

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